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No. 07-582

IN THE

Supreme Court of the United States

Federal Communications Commission, *et al.*

Petitioners,

v.

Fox Television Stations, Inc. *et al.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* PARENTS TELEVISION COUNCIL IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Parents Television Council (PTC) is a nonprofit, nonpartisan, grassroots organization dedicated to improving the content of entertainment programming, with an emphasis on prime time television. Founded in 1995, PTC is funded by contributions from its 1.1 million members and other supporters throughout the United States. It works with television producers, broadcasters and sponsors in an effort to stem the increasing tide of harmful messages targeted at children.

PTC has encouraged elected and appointed government officials and agencies to enforce broadcast decency standards that exist in statute and regulation, and it has encouraged its members and others to file complaints with the FCC about broadcasts they believe violate the indecency law, including the broadcasts at issue in this case. Many of the complaints filed with the FCC about the 2002 and 2003 Fox broadcasts came from PTC members. PTC participated as *amicus curiae* in the Second Circuit proceeding below.

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[1] As required by Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* states that all parties have consented in writing to the filing of this brief.

STATEMENT OF THE CASE

PTC adopts the Petitioner's Statement.

INTRODUCTION AND SUMMARY OF ARGUMENT

PTC disagrees with the petitioners that the proper disposition of this case is for the Court to reverse the decision below and to remand the case for further proceedings. PTC contends that the Court should, for the reasons urged by petitioners, first reverse the Second Circuit's decision. It should then consider respondents' constitutional challenges to the FCC's change in policy regarding isolated expletives during times when children are likely to be in the television audience, as embodied and reiterated in its Remand Order. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, In re* 21 F.C.C.R.13311 (November 6, 2006).

The question presented is broad enough to embrace the constitutional issues raised by respondents below and addressed by the Second Circuit. PTC recognizes that the Second Circuits decision purported to deliver as mere dicta its view that the FCC's new enforcement policy is unconstitutional. But by addressing the constitutional question, including its survey of the Court's jurisprudence in the area of indecency regulation and wondering aloud about the continuing viability of the Court's holding in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), the Second

Circuit has invited review by this Court. The Second Circuit also made clear that no matter what the FCC did by way of trying to cure the purported defects in its enforcement policy, that court believed that enforcement of 18 U.S.C. ¶ 1464 relating to indecency was an outdated notion.

Respondent NBC argued in its opposition to petitioners' brief seeking a writ of certiorari that if certiorari were granted, then the Court would necessarily have to consider NBC's constitutional challenges to the FCC's new enforcement policy. NBC's Brief in Opposition (Br. Opp.) at 27-28. If NBC meant what it said, then it will doubtless brief its constitutional arguments to the Court and respondents can reply. In view of the Second Circuit's broad pronouncements concerning what it sees as the constitutional infirmities of the FCC's Remand Order, there is little point in remanding this case. For the Second Circuit has made clear its dim view of the constitutionality of the Remand Order.

PTC therefore urges the Court to consider whether *Pacifica* is still good law and, by extension, whether Section 1464 still means what it says when it comes to indecency.

The Court has observed in another context that "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Turner Broadcasting,* 512 U.S. 622, 663 (1994) (quoting *United States v. Southwestern Cable Co.,* 392 U.S. 157, 177 (1968)). The record in this case shows that

that is still true. The Court has also held that one who has been granted a license to broadcast over scarce public airwaves serves in a sense as a fiduciary for the public. *FCC v. League of Women Voters of California*, 468 U.S. 364, 377 (1984). The Court should decide whether *that* proposition is still true.

In 1978, this Court held in *Pacifica* that because of the broadcast media's pervasive scope, intrusive nature and accessibility to children, the FCC could constitutionally regulate the broadcast of indecent material. NBC contemptuously refers to *Pacifica* and its supporting precedent as "moth-eaten." NBC Br. Opp. at 30 and 32 n.9. NBC seems to believe that Pacifica is an outdated artifact of a different time that should now be put aside.

The times may be different, but the salient facts in *Pacifica* and in this case are the same.

• Broadcast television is still a uniquely pervasive influence in America, it is still uniquely accessible to children, and it still confronts the viewer in the privacy of the home.

• The FCC's action under review here is not a ban on broadcasting, only a channeling of certain kinds of language to a time when children are less likely to be watching and listening. The same was true in *Pacifica*.

• Here, as in *Pacifica*, the order at issue is from an agency with long experience in the area being regulated and it is declaratory, not punitive.

The FCC has not levied any penalty against Fox arising out of the 2002 and 2003 broadcasts.

• And, of course, here and in *Pacifica* the broadcast medium is one that traditionally has been afforded less First Amendment protection than others.

All of those facts were important to the holding in *Pacifica*, and all of them are present in this case.

Technology does not trump Section 1464. V-chip technology is not an effective bulwark against indecent broadcasting. Studies show that v-chip technology is little known and less understood by parents, and that the ratings assigned to programming are driven by the need for advertising revenues, rather than the true content of programming. The 2002 and 2003 Fox broadcasts at issue in this case, for example, were mislabeled and given a far weaker label than they merited.

Broadcasters are not unfairly put upon by not being able to broadcast whatever they want until after 10 p.m. each day. Nor are they really at a competitive disadvantage with cable; they own significant portions of the cable spectrum and therefore control-and sometimes even create–the very cable content that they contend so disadvantages them as broadcasters. They cannot with a straight face point to their often coarser fare on cable as a reason to permit them to do the same on broadcast television.

Broadcasters also often contend with a shrug that their programming is no more objectionable than what children can hear in other venues, including the internet and cable television. That there is racy fare available elsewhere in the media world does not mean that it must be available on the public airwaves at times when children are likely to be watching.

All the FCC has done in this case is to insist that Fox not broadcast four-letter vulgarities on prime time television to an audience it knew would include large numbers of children. This case is not an affront to artistic expression or a threat to the First Amendment. Instead, it is about whether Section 1464 is to have any continuing vitality in affecting what the broadcasters can send into America's homes, or whether, as respondents seem to argue, the indecency statute is a polite fiction that can be safely ignored.

ARGUMENT

I. The NBC and Fox Broadcasts Show How Lightly Respondents Take Their Obligations To Avoid Broadcasting Indecent Material

In 2001, faced with a rising tide of complaints about offensive television broadcasting, the FCC issued a policy statement aimed at helping the broadcast industry avoid violations of Section 1464. *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement*

Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (March 14, 2001) (*Industry Guidance*). That *Guidance* made clear that fleeting expletives, in context, could violate Section 1464. *Id.* at 8008-8009 ¶¶ 17, 19.

NBC ignored the FCC's *Industry Guidance.* In January 2003 it broadcast the Golden Globe Awards. The singer Bono won an award and in his acceptance speech, he said, "This is really, really fucking brilliant. Really, really great." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program,* 19 F.C.C.R. 4975, 4976 (March 18, 2004). The FCC found that in context Bono's comment was indecent, but it did not impose any sanction on NBC because its prior administrative precedent indicated that a fleeting broadcast of a single expletive like that at issue was not indecent. *Id.* at 4980-82 ¶¶ 12, 15.

Fox, too, ignored the *Industry Guidance.* On December 9, 2002 it broadcast the Billboard Music Awards, which aired at 8 p.m. on the East Coast. The entertainer Cher received an award and during her acceptance speech she taunted her critics, and concluded, "People have been telling me I'm on the way out every year, right? So fuck 'em. I still have a job and they don't." Petitioner's Appendix (Pet. App.) 116a ¶ 56. FOX gave its 2002 broadcast only a TV-PG (parental guidance suggested) rating.[2] According to Nielsen ratings data, just under 28% of

[2] An explanation of Fox's ratings system is found in the FCC's Remand Order. Pet. App. 77a n.47 ¶ 18.

the almost 10 million viewers of the 2002 Billboard Music Awards were under 18, and 12.7% of those were between the ages of 2 and 11. *Id.* at 119a ¶59. The bland rating that Fox assigned to that broadcast would not have alerted parents that their children might be exposed to Cher's foul language. Fox did not contend before the FCC that Cher's use of the F-word was in any way justified, or that it had some inherent artistic value. *Id.* at 119a-120a

The next year, almost to the day, Fox again broadcast the Billboard Music Awards, again in prime time, at 8 p.m. on the East Coast. And again it broadcast the same word that Cher had used the year before, and another to boot. This time, Paris Hilton and Nicole Richie, the stars of a show called "The Simple Life," were teamed to present an award. Fox's script writers teased the audience about Cher's expletive of the year before on the same show by having Ms. Hilton warn Ms. Richie to "watch the bad language." "It feels so good to be standing here tonight," Ms. Hilton continued. Without missing a beat, Ms. Richie replied, "Yeah, instead of standing in mud and [audio blocked]. Why do they even call it 'The Simple Life'? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." Pet App. 70a-71a ¶13. Fox conceded before the FCC that Nicole Richie's language during the 2003 broadcast did not have any artistic merit and did not convey any message. *Id.* at 76a n.44.

Again, according to the Nielsen ratings, the audience included a significant number of viewers under 18 (23.4%) and a large audience between the ages of 2 and 11 (11%). Pet. App. 76a ¶18. And

again, despite its experience the year before with Cher, Fox mislabeled its program. It had upped its rating from TV-PG, which it used for its 2002 broadcast, to TV-PG(DL), the "D" meaning that the program may contain some suggestive dialogue, the "L" that it may contain some infrequent coarse language. *Id.* 77a ¶18 n. 47. There was nothing *suggestive* about Ms. Richie's language; it was explicit. And her comments can only charitably be described as coarse.

Fox knew what was likely to happen. In the course of three episodes of "The Simple Life" it broadcast in the days leading up to the 2003 Billboard Music Award show, Fox had had to bleep Ms. Richie nine times. *Id.* 92a ¶33. Fox was on notice that, as she so often did on "The Simple Life," Ms. Ritchie would likely "go blue" on the air. It knew there was a good chance that Ms. Richie would use vulgar language because it caught the first expletive; why not the other two?

II. Broadcast Television Is Still Uniquely Pervasive and Uniquely Accessible To Children

The holding in *Pacifica* was bottomed on the broadcast media's pervasiveness and accessibility to children. 438 U.S. at 748-49. The broadcasters appear to believe that *Pacifica* is a stray outlier in First Amendment jurisprudence that is now irrelevant and should be put aside. Not so. The special place that broadcasting occupies in the media universe has been noted by the Court in the years since *Pacifica*. *See Turner Broadcasting Sys., Inc. v.*

FCC, 512 U.S. at 637 ("[O]ur cases have permitted more intrusive regulation of broadcasters than of speakers in other media") and *Reno v ACLU*, 521 U.S. 844,868 (1997) (noting "special justifications for regulation of the broadcast media that are not applicable to other speakers," citing *Pacifica*).

What then has changed since *Pacifica*, *Turner Broadcasting* and *Reno* that the Court should now overrule *Pacifica*? Not much, when it comes to the broadcasters' dominance over other media.

The FCC recognized in its Remand Order the reality that broadcast television remains as uniquely pervasive in the lives of Americans, and as uniquely accessible to children, as it was when the Court decided *Pacifica*. In 2003, the FCC found, more than 98% of households had at least one television set and despite the fact that many of those with televisions - almost 86% - subscribe to a cable or satellite service, more than 15 million do not and rely exclusively on broadcast television. Moreover, a significant number of cable and satellite subscribers receive broadcast television through their subscriptions. Pet. App. 106a-107a ¶ 149; in addition, some 68% of children between the ages of eight and 18 have a television set in their bedrooms, and almost half of those are broadcast-only. *Id.*

Broadcast television's pervasiveness can be seen as well in the huge advantage it has in viewership when compared to cable and satellite. In September 2006, each of the top ten broadcast programs had more than 15 million viewers; only one cable program had even 5 million viewers. *Id.* at

108a ¶ 50. During the 2004-2005 season, of the 495 most-watched programs, 485 of them were on broadcast television and the highest-rated cable program rated only 257 on the list of most-watched programming. *Id.* With broadcasting that far ahead of its competition, it is safe to say that it is not only pervasive; it is uniquely pervasive. And for the same reason, it is still uniquely accessible to children.

Simply put, broadcast programming saturates the nation's airwaves and dominates what is seen and heard in the nation's homes, particularly by children. That is why, despite their claims that they are besieged on all sides by viewing and listening alternatives on the internet and elsewhere, none of the broadcasters has chosen to abandon the free public airwaves.

III. Technology Should Not Relieve Broadcasters Of Their Obligations Under Section 1464

The broadcasters argue that viewers who do not want to avoid indecent programming can avoid it with the use of a technology filter. They have it backwards. Section 1464 addresses broadcasting, not receiving. That statute should not be disposed of by making viewers fend for themselves so that broadcasters can have a free hand with the public airwaves.

By putting the onus of Section 1464 on the broadcasters, Congress chose the simplest and most direct way of addressing the problem of broadcast indecency. Congress did not leave the viewing public

to look out for itself. A technological solution at the viewers' end – if it worked, and it does not - shifts the problem of broadcast indecency from the broadcasters to the public, and effectively reverses the power flow of Section 1464 from a restriction on broadcasters to a burden on viewers and listeners.

The Court in *Pacifica* noted the intrusive nature of broadcasting, commenting that it comes into the privacy of the home, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748.[3] The Court has made the same point in other cases. *See Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970) (right to avoid unwelcome speech has special force in the privacy of the home); and *Frisby v Schultz,* 484 U.S. 474, 485 (1988) ("We have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.").

Those observations are particularly pertinent here. The ratings that Fox assigned to the 2002 and 2003 broadcasts were inadequate to warn parents that their children were at risk of being subjected to gratuitous expletives on prime time television. There is no reason why viewers should have to filter broadcasters' fare against indecency, and every

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[3] In his concurrence in *Pacifica*, Justice Powell put it this way: "broadcasting – unlike most other forms of communication – comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." 438 U.S. at 759 (citations omitted).

reason why the broadcasters should do the job themselves, as Congress intended.

Enforcement of the FCC new policy will not be the death of live television. Broadcasters can and should use technology at their end, by delaying the broadcast of live events 10 seconds or so, or however long is necessary, in order to ensure that they do not violate Section 1464. If broadcasters took Section 1464 seriously, they would do so already for the broadcast of award shows, which have proven to be unpredictable and troublesome.

In addition to the fact that a technology "solution" turns the Congressional regulatory scheme on its head, the technology available does not work. The so-called v-chip technology[4] is only as good as the rating system it is based on, and that system is bad. The best evidence of that are the inaccurate underratings Fox gave to its 2002 and 2003 broadcasts. Moreover, among those parents who have heard of the broadcasters' ratings system, most do not understand what they mean. Kaiser Family Foundation Survey, *Parents, Children & Media,* June 2007 at 8.

The FCC's Remand Order noted that the "TV-PG" rating is the most common rating given by the broadcasters to their programming, covering a majority of programming. That rating means that a program may contain material that parents find unsuitable for younger children, and that parents

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[4] V-chip technology is explained in the Second Circuit's decision below. Pet. App. 42a n.14.

may want to watch that program with their children. Pet. App. 77a n.47. That the majority of broadcast television programming carries a rating that suggests parental supervision is a telling indictment of what the broadcasters are sending into the nation's living rooms. Put another way, if the broadcasters have accurately rated their programming, then, by their own estimation, the majority of what they broadcast must be watched with caution by children. That is a telling indicator of the continuing need for *Pacifica* and ready enforcement of Section 1464.

Broadcasters' increasing indifference to the constraints of Section 1464 in recent years prompted Congress, over the objection of the broadcasters, to put real teeth in the statute when it significantly increased the penalty for broadcast indecency. *See* Broadcast Indecency Enforcement Act of 2005, Public Law No. 109-235, 120 Stat. 491. Congress acted with near unanimity. The Senate passed the Act unanimously and in the House, it passed 379-35; the President signed it a week later.[5] Respondents should not be allowed to end-run Congress by placing the burden on parents try to avoid their children being exposed to gratuitous expletives during prime time.

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[5] http://www.govtrack.us/congress/bill.xpd?bill=s109-193

IV. The FCC's Enforcement Of Section 1464 Does Not Meaningfully Restrict The Rights Of Broadcasters

The FCC's new enforcement policy is not about *whether* broadcasters can ever broadcast expletives or other indecent speech; it is about *when* they can do so. Respondents can broadcast the very language at issue here - and more - at other times and in other places. All the FCC is trying to do is channel indecent broadcasts away from the 6 a.m. to 10 p.m. time period. 47 C.F.R. 73.3999(b). Moreover, Fox and the other respondents all own cable channels on which they can broadcast whatever they want, whenever they want. Their websites show that Fox owns 16 cable channels; ABC owns 10; CBS owns at least two; and NBC owns nine cable channels.[6]

All the Remand Order required was that respondents restrain themselves during the times when children are most likely to be watching television. That was a reasonable restriction in *Pacifica*, and it is still reasonable.

Conclusion

In 2003, Fox broadcast live and unfiltered a celebrity who it knew was inclined to utter

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[6] Fox: http://www.newscorp.com/operations/cable.html; ABC: http://corporate.disney.go.com/careers/who_abc_cable.html; CBS: http://www.cbscorporation.com/our_ company/ divisions/cbs_corporation/index.php; NBC: http://www.nbc.com /nbc/NBC_ Universal_Cable_Networks/

unscripted expletives; it knew from past Nielsen ratings that large numbers of viewers under the age of 18 would be watching; and it underrated the broadcast so that parents had no reason to expect that they would be subjected to prime time crudity like that gratuitously uttered by Ms. Richie.

Technology cuts both ways. There is no reason why the broadcasters cannot impose a brief time delay in their live broadcasts in order to avoid unscripted vulgarities. After all, Fox's 2002 and 2003 broadcasts were delayed by one hour in the Mountain time zone and three hours in the Pacific time zone. Pet. App. 95a ¶ 36. A 10-second delay should not be an onerous burden in order to give meaning to Section 1464.

The Court should uphold the FCC's new enforcement policy contained in the Remand Order as constitutionally valid under the holding of *Pacifica.*

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